TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutory Provisions Involved	2
Statement of Facts	3
Reasons for Granting the Writ	4
Robinson-Patman Price Discrimination Act	4
Sherman Act	10
Conclusion	13
Appendix A (Opinion of Court of Appeals)	1a
Appendix B (Opinion of District Court)	2a
Appendix C (Title 15, U.S.C. Sections 1, 13)	5a
Appendix D (First Cause of Action of First Amended Complaint)	10a
Appendix E (Second Cause of Action of First Amended Complaint)	15a

TABLE OF AUTHORITIES

CASES:	Page
Board of Trade vs. United States, 246 U.S. 231 (1918)	12
Clairol, Inc., vs. Federal Trade Commission, 410 F.2d 647 (9th Cir. 1969)	10
Federal Trade Commission vs. Henry Broch & Co., 360 U.S. 166 (1966)	5, 6
Federal Trade Commission vs. Simplicity Patterns, 360 U.S. 55 (1959)	5
Great Atlantic & Pacific Tea Co. vs. Federal Trade Commission, 106 F.2d 667 (3rd Cir. 1939)	5
LaPeyre vs. T.T.C., 366 F2d 117 (5th Cir. 1966)	11
Peelers Co. vs. Wendt, 260 F. Supp. 193 (W.D. Wash., S.D. 1966)	11
Rangen, Inc., vs. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), cert. den., 383 U.S. 936 (1966)	7
South Carolina Counsel of Milk Producers, Inc., vs. Newton, 360 F.2d 414 (4thCir. 1966)	11
Southgate Brokerage Co. vs. Federal Trade Commission, 150 F.2d 607 (4th Cir. 1945)	5

Page

Times-Picayune Publishing Co. vs. U.S., 345 U.S. 594 (1953) 12, 13

U.S. vs. Patten, 226 U.S. 525 (1913) 12

United States vs. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 12, 13

United States vs. Reading Co., 226 U.S. 324 (1912) 12, 13

United States vs. United Shoe Machinery Co., 264 F. 138 (E.D. Mo. 1920), 258 U.S. 451 (1922) 9

United States vs. United States Gypsum Co., 340 U.S. 76, 87 (1950) 12

Western Fruit Grower Sales Co. vs. Federal Trade Commission, 322 F.2d 67 (9th Cir. 1963) 5

MISCELLANEOUS:

Websters Third International Dictionary of the English Language, unabridged; G & G Merriam Company, publisher, Springfield, Massachusetts, U.S.A.; 1961, pp. 306, 1844, 1845, 2061, 2062 7, 8

RULES:

Federal Rules of Civil Procedure, Rule 12(b) 4

STATUTES:

Robinson-Patman Price Discrimination Act 1, 4, 5, 7

	Page
Sherman Act	1, 2, 10, 11
United States Code, Title 15, Section 1	2, 3
United States Code, Title 15, Section 13	5
United States Code, Title 15, Section 13(a)	5, 7, 10
United States Code, Title 15, Section 13(b)	5
United States Code, Title 15, Section 13(c)	2, 4, 5, 6, 7
United States Code, Title 15, Section 13(d)	5
United States Code, Title 15, Section 13(e)	5
United States Code, Title 15, Section 15	4
United States Code, Title 28, Section 1254(1)	1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

KEN FOSTER COMPANY, INC.,
A Corporation,

Petitioner.

v.

CHRYSLER LEASING CORPORATION,
AVIS RENT-A-CAR SYSTEMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, KEN FOSTER COMPANY, INC., A Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit entered in this proceeding on November 6, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, which is certified for non-publication, appears at Appendix A to this petition. The opinion of the District Court for the Northern District of California is unreported and appears at Appendix B to this petition.

JURISDICTION

The order or judgment of the Court of Appeals was entered on November 6,1973. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

THE MAJOR QUESTION WHICH WOULD BE ONE OF FIRST IMPRESSION OF THIS COURT, AND OF GREAT IMPORTANCE TO ANTI-TRUST LAWS IS:

(1) CAN LARGE CORPORATIONS DISCRIMINATE WITH IMPUNITY AND AVOID THE ROBINSON-PATMAN PRICE DISCRIMINATION ACT BY THE SUBTREFUGE OF LEASES.

Other questions involved in the case are:

(2) Whether under the Sherman Act, the effect of the restraint of trade upon only the plaintiff is considered or the effect of the restraint of trade upon all persons in plaintiff's position is considered.

(3) Whether under the Sherman Act there must be an anti-competitive purpose as well as an anti-competitive effect by the defendants' action.

STATUTORY PROVISIONS INVOLVED

The portions of the statutory provisions actually involved are set forth below, and the full text of the statutes involved is set forth in Appendix C.

> "Title 15 U.S.C. §13. Discrimination in price, services, or facilities.
>
> (c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

> "Title 15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.
>
> Every contract, combination in the form of trust or otherwise, or

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . "

STATEMENT OF FACTS

Plaintiff was involved in the leasing of motor vehicles to members of the general public in several locations within the State of California. Plaintiff's customers were approximately one-half (1/2) engaged in interstate trips, and the other one-half (1/2) in intrastate trips. From January 1, 1964, through the filing of the complaint in the District Court on December 30, 1969, a period of five (5) years, plaintiff leased a large portion of its fleet of rental automobiles from CHRYSLER LEASING CORPORATION. During said same period of time, CHRYSLER LEASING CORPORATION had leases with defendant AVIS RENT-A-CAR SYSTEMS, INC., and its subsidiaries, which leases were essentially on the same terms as plaintiff's leases, except that the number of cars varied from lease to lease. AVIS RENT-A-CAR SYSTEMS, INC., and its subsidiaries used said automobiles in their car rental business in direct competition with plaintiff. During said period of time, CHRYSLER LEASING CORPORATION entered into an agreement with defendant AVIS RENT-A-CAR SYSTEMS, INC., wherein CHRYSLER LEASING CORPORATION agreed to and did pay to AVIS RENT-A-CAR SYSTEMS, INC., and its subsidiaries, a sum of money as an allowance (or discount in lieu thereof) which allowance or discount was not for services rendered in connection with the lease of the vehicles from CHRYSLER LEASING CORPORATION and which sum plaintiff believes to have been approximately twenty dollars ($20.00) per

vehicle for a month, which is approximately one quarter (1/4) of the rental fee charged both plaintiff and AVIS RENT-A-CAR SYSTEMS, INC., and its subsidiaries. There was no difference in the vehicles leased or in the operation of the businesses. Plaintiff's actual financial loss by not receiving the discount or rebate was between seventy five thousand and eighty four thousand dollars ($75,000 and $84,000).

The basis for federal jurisdiction in the district court is contained in 15 U.S.C. §15 which states:

> "Suits by persons injured; amount of recovery.
> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323 §4, 38 Stat. 731.)"

REASONS FOR GRANTING THE WRIT

1. Robinson-Patman Price Discrimination Act.

Does subsection (c) of 15 U.S.C. §13 apply to leases? There has been no Supreme Court decision on this problem. The first cause of action of the First Amended Complaint was decided by the District Court by granting a motion to dismiss said cause of action under Rule 12(b) of the Federal Rules of Civil Procedure. Appendix D is a

verbatim copy of this first cause of action.

15 U.S.C. §13 is divided into six (6) subsections. Each subsection is to be construed independently without reference to the other subsections. Subsection (a) was the original Clayton Act and all of the other subsections were added in 1936 by the Robinson-Patman amendments. The history of the Robinson-Patman amendments shows that they were designed to overcome discriminatory practices not covered by the law prior to that time.

The case of Federal Trade Commission vs. Simplicity Patterns Co., 360 U.S. 55 (1959) distinguishes subsections (c), (d) and (e) of Section 13 from subsection (a). The only subsection which applies to the whole section is subsection (b) which does so by explicit wording.

Great Atlantic & Pacific Tea Co. vs. Federal Trade Commission, 106 F.2d 667 (3rd Cir. 1939), holds that subsection (c) states absolute prohibitions of payment of the allowance or discount in lieu thereof to, in that case, a buyer upon the buyer's own purchases. The court in this decision goes into congressional history of the enactment of subsection (c). Of like effect are the cases of Southgate Brokerage Co. vs. Federal Trade Commission, 150 F.2d 607 (4th Cir. 1945); Federal Trade Commission vs. Henry Broch and Co., 360 U.S. 166 (1960); Western Fruit Grower Sales Co. vs. Federal Trade Commission, 322 F.2d 67 (9th Cir. 1963).

The wording used by the courts in each of these decisions quite often has the words

"buyer", "seller", and "sale". However, the context of the cases under discussion was sales rather than leases. Nowhere in these decisions is there any holding that subsection (c) is restricted to sales.

The wording of subsection (c) which applies to our case is as follows:

> "(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, . . . either to the other party to such transaction. . . "

The first omitted part states, "except for services rendered in connection with the sale or purchase of goods, wares, or merchandise." The second omitted part states, "or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." Neither omitted part is pertinent to the decision in this case, since there were no allegations in the pleading regarding services rendered or agents or representatives.

As written, the prohibition applies to leases as well as sales. In the case of Federal Trade Commission vs. Henry Broch and Co., supra, a case dealing with subsection (c), in the footnote on page 169, the Court expressed a view that the legislative history demonstrates a congressional attempt

to proscribe all types of activity which could possibly come under the wording of the statute. This case holds that the statute was designed to cover a multiplicity of sins and was to be broadly construed.

All of the cases which petitioner has found (refusing to apply the Robinson-Patman Act to leases) have dealt with subsection (a). In addition, these decisions distinguish between (a) goods, wares and merchandise; and (b) other types of property, such as land, licenses for the showing of motion pictures and the like.

As stated by the Court in Rangen, Inc., vs. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), cert. den., 383 U.S. 936 (1966) at page 861.

> "[5] Section 2(a) deals expressly with the granting of discriminatory prices, while section 2(c) prohibits a particular trade practice deemed by Congress to be detrimental to competition. Section 2(c) is to be construed independently, without reference to the price discrimination section. . . "

The definition of various words used in Section 13 as shown by Websters Third New International Dictionary of the English Language, unabridged; G & G Merriam Company, publisher, Springfield, Massachusetts, U.S.A., 1961, pp. 306, 1844, 1845, 2061, 2062, is as follows:

Sold	"the past tense of sell"
Sell	"2a(1) to give up (property) to another for money or other valuable consideration: hand over or transfer title to (as goods or real estate) for a price [sold his books] [sold his house] [sold his stock] -- opposed to buy (2): to offer for sale: deal in as an article of sale [-s home appliances] [-s insurance]. . ."
Purchase	"1a (archaic). . . b: to acquire (real estate) by any means other than descent or inheritance c: (archaic) . . .d: to obtain (as merchandise) by paying money or its equivalent: buy for a price [purchased a new suit] e: to obtain (something desired) by an outlay (as of labor, danger, sacrifice) [-one's life at the expense of one's honor]: win, earn [his place was dearly purchased]. . ."
Purchaser	"one that purchases: as a (obs) . . .b: one that acquires an estate in lands by his own act or agreement or takes or obtains an estate by any means, other than by descent or inheritance c(1): one that acquires property for a consideration (as of money): buyer, vendee . . ."
Buyer	"purchaser"
Seller	"one that offers for sale..."
Sale	"1: the act of selling: a contract transferring the absolute or general ownership of property..."

All of the definitions quoted except one (sale) encompass a lease. The lease from CLC to Foster required Foster (1) to be liable for all destruction and damage of the property, (2) to be liable to third persons for injuries caused by the property, (3) to cover the property with liability insurance for such liability, and (4) to be responsible for all licenses and taxes upon the property. All of these elements are elements of ownership. The only element that is not an element of ownership is that the lease required Foster to return the property at the end of the six month term.

The sale and buy-back transactions entered into by Ford and General Motors with Foster (and others) had the same four (4) elements listed above in the CLC lease to Foster. At the end of the term, Foster had the option to return the property to Ford or General Motors at a specified price, or to retain it. Thus the only difference between the CLC lease and the Ford and General Motor sale is who at the end of the term had the option with regard to the return of the property.

The initial case in this area is United States vs. United Shoe Machinery Co., 264 F. 138 (E.D. Mo. 1920). The Supreme Court's upholding of the Judgment of the district court does not mention any distinction between lease and sale. United States vs. United Shoe Machinery Co., 258 U.S. 451 (1922).

The District Court's opinion overcame a defense by United Shoe Machinery Co. that the company was allowed to distinguish between wholesale and retail transactions because the statute allowed such a distinction. The District Court's opinion

stated that there was no classification of wholesale and retail transactions under United Shoe Machinery Company's operating procedures. The Court went on to say, as an additional reason, that the statute referred only to sales rather than leases of machinery. This distinction which was in a subsection (a) case, was for the purpose of holding an anti-trust violator liable. In our case, the distinction is being used by defendants to avoid anti-trust liability.

It is only in recent times that substantial volumes of business have been conducted in the United States economic community on the basis of leases. Under present economic practices, almost anything can be leased with the same financial results to both parties as a sale. As a practical economic matter it does not make any difference to the parties, whether the transaction is denoted a lease, lease purchase, or outright sale. To allow the evasion of such an important law by draftsmanship of the documents between the parties when there is little economic difference, would defy the intent of Congress.

The case of Clairol,Inc., vs. Federal Trade Commission, 410 F.2d 647 (9th Cir. 1969), is an example of defining the word "resale" in a very broad manner with regard to beauty products in order to bring the activity within the intended scope of the Statute.

2. Sherman Act.

Appendix E hereto contains verbatim the second cause of action of the First

Amended Complaint. The second cause of action, which is based upon the Sherman Act, was ruled against petitioner by granting of summary judgment in favor of defendants.

When discovery has been completed, plaintiff believes it will show that defendant AVLS RENT-A-CAR SYSTEMS, INC., was the only person receiving the price rebate in California, and perhaps in the nation, and that defendant CHRYSLER LEASING CORPORATION leased to hundreds, maybe thousands of other car rental agencies and did not grant them the price rebate. The amount of the price rebate was substantial, being approximately twenty five percent (25%) of the total lease cost. The defendants' conduct thus affected a substantial segment of the car rental market, because the plaintiff and many others were discriminated against. It is not necessary that any one person having a substantial segment of the market be injured by the illegal conduct, only that there is a substantial effect on the market by the defendants' conduct. LaPeyre vs. T.T.C., 366 F.2d 117 (5th Cir. 1966); Peelers Co. vs. Wendt, 260 F. Supp. 193 (W.D. Wash., S.D. 1966); South Carolina Counsel of Milk Producers, Inc., vs. Newton, 360 F.2d 414 (4th Cir. 1966). It would be inconceivable that the granting of a twenty five percent (25%) rebate to one major dealer, and withholding it from all other dealers did not adversely affect the competition in the rental car business.

The fact that the rebate made AVIS better able to compete in the market is no defense, as discriminatory practices always make the one party who receives the favorable discrimination better able to compete against those who do not. The Court is to look at the effect of the discriminatory

practice as a whole, not dismember it into its parts. U.S. vs. Patten, 226 U.S. 525 (1913).

Likewise, it is no defense that the intention of the defendants entering into their contract for the rebate had a genuine business intention if the effect of the contract is one prohibited by the anti-trust laws. United States vs. United States Gypsum Co., 340 U.S. 76, 87 (1950).

A contract violates the Sherman Act if unreasonable restraint was either its object or its effect. Times-Picayune Publishing Co. vs. U. S., 345 U.S. 594 (1953).

If there is no per se violation of the Sherman Act, the court is required to make an appraisal of the market impact of the challenged practices under the rule of reason. United States vs. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

The destruction of Foster by the activities of the defendants certainly had no effect upon the overall market. However, the activities of the defendants had a drastic effect on the overall market. This is the proper test.

The"rule of reason" does not require that the defendants' purpose and intent be anti-competitive. Board of Trade vs. United States, 246 U.S. 231 (1918), that court held that good intention will not save an otherwise objectionable contract and that intention is only usable because it may help the court to determine the facts and predict the consequence. Only in a doubtful case will the court allow intent to be determinative. United States vs. Reading

Co., 226 U.S. 324 (1912). The Sherman Act cannot be evaded by good motives and under the "rule of reason", the promotion of self-interest does not legalize otherwise illegal conduct. United States vs. Arnold, Schwinn & Co., supra.

A contract violates the Sherman Act if unreasonable restraint was either its object or effect. Times-Picayune Publishing Co. vs. United States, supra. Here, because of financial weakness, and because Foster began using CLC as its main supplier of automobiles, Foster, and undoubtedly many other small companies, became unable to transfer from CLC to Ford or General Motors and thus CLC was the only supplier available to them and the refusal of CLC to grant the rebate to small leasing companies, resulted in their injury and in Foster's case, destruction.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

TERRANCE K. McCLEEREY
REX PRYER

457 Webster Street
Monterey, California 93940

Counsel for Petitioner

Dated: January 25, 1974.

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Ken Foster Company, Inc., a corporation, Appellant, vs. Chrysler Leasing Corporation, Avis Rent-A-Car System, Inc., and Doe 1 through 2,000, Inclusive, Appellees.	)	No. 71-2408

[November 6, 1973]

Appeal from the United States District Court for the Northern District of California

Before: TUTTLE*, TRASK and GOODWIN, Circuit Judges.

ORDER

The judgment appealed from is affirmed. The district court correctly granted summary judgment on both the Sherman Act claim and the claim based upon §16720 of the California Business and Professions Code. The court also dis-

*The Honorable Elbert P. Tuttle, United States Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

missed claims based upon the Robinson-Patman Act and §17045 of the California Business and Professions Code.

The Robinson-Patman Act is limited by its terms to sales. The courts have not expanded the Act to cover transactions other than sales. See Students Book Co. vs. Washington Law Book Co., 232 F.2d 49, cert. denied, 350 U.S. 988 (1956); United States vs. United Shoe Machinery Co.,264 F. 138 (E.D. Mo. 1920) aff'd on other grounds, 258 U.S. 451 (1922).

The lease device employed in this case does not resemble a sale so closely as to require a trial to test the reality of the transaction as a lease. Cf. Stanton vs. Texaco, 289 F. Supp. 884 (D.R.I. 1968).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEN FOSTER, INC., a California corporation, Plaintiff, vs. CHRYSLER LEASING CORPORATION, a corporation, AVIS RENT-A-CAR SYSTEM, INC., a corporation, Defendants.	)))))))))	No. C-69-664 LHB ORDER DISMISSING THE FIRST AMENDED COMPLAINT

Defendants Chrysler Leasing Corporation and Avis Rent-A-Car System, Inc., moved pursuant to F.R.C.P. 12(b)(6) to dismiss the first, fourth and fifth causes of action of the first amended complaint upon the ground that each does not state a claim upon which relief can be granted. The Court finds that the first, fourth and fifth causes of action of the first amended complaint, and each of them, do not state a claim upon which relief can be granted, and

IT IS THEREFORE ORDERED:

That the first, fourth and fifth causes of action of the first amended complaint are dismissed with prejudice and without leave to amend.

Dated: June 5, 1970.

/s/
LLOYD H. BURKE, Judge
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KEN FOSTER COMPANY, INC., a corporation, Plaintiff, vs. CHRYSLER LEASING CORPORATION, a corporation, AVIS RENT-A-CAR SYSTEM, INC., a corporation, Defendants.	NO. 69-664-RHS SUMMARY JUDGMENT

CHRYSLER LEASING CORPORATION, a corporation,

Counter-Claimant,

vs.

KEN FOSTER COMPANY, INC., a corporation, and KENNETH G. FOSTER, JR., an individual,

Counter-Defendants.

The cause came on regularly to be heard before the Honorable Robert H. Schnacke, United States District Judge, on June 9, 1971, pursuant to the noticed motions of defendants CHRYSLER LEASING CORPORATION and AVIS RENT-A-CAR SYSTEM, INC., for summary judgment on the second and third causes of the first amended complaint; McCutchen, Black, Verleger & Shea, by G. William Shea, and Blecher & Collins, by Maxwell M. Blecher, appeared for the moving parties and Foster, Pryer & Antoncich, Inc., by Robert A. Pryer, appeared for the responding party; the Court considered the pleadings, the documents presented and filed with respect to the motions, and heard and considered the argument of counsel; at the conclusion of such hearing the Court took such motions under submission and thereafter, on June 10, 1971, by written order granted defendants' motions; the first, fourth and fifth causes of plaintiff's first amended complaint have heretofore been dismissed;

NOW, THEREFORE:

IT IS ORDERED that the complaint of plaintiff KEN FOSTER COMPANY, INC., be, and it is hereby, dismissed;

IT IS FURTHER ADJUDGED AND DECREED that plaintiff take nothing by its complaint herein and that defendants CHRYSLER LEASING CORPORATION and AVIS RENT-A-CAR SYSTEM, INC., be, and they hereby are, awarded their costs in this matter against plaintiff.

Dated this 20th day of July, 1971.

/s/
United States District Judge

APPENDIX C

Title 15, U.S.C., Section 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the

making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, §1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282.)

Title 15, U.S.C., Section 13. Discrimination in price, services, or facilities.

(a) Price; selection of customers.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States of any Territory thereof or the District of Columbia, or

any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowlingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions

affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescense of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination.

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage or other compensation.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection

with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct of indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale.

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing,

handling, sale,or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. (Oct. 15, 1914, ch. 323 §2, 38 Stat. 730; June 19, 1936, ch. 592, §1, 49 Stat. 1526.)

APPENDIX D

FIRST AMENDED COMPLAINT FOR ANTI-TRUST VIOLATIONS
FIRST CAUSE OF ACTION

Plaintiff alleges for the first cause of action:

1

This first cause of action is based upon the provisions of United States Code Title 15, Section 13 and related sections.

2

Plaintiff is and was at all times hereinmentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the State of California and doing business in the County of San Francisco, San Mateo and Los Angeles, State of California.

3

Defendant, CHRYSLER LEASING CORPORATION, is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in a state other than the State of California, and authorized to do business and doing business in the State of California.

4

Defendant, AVIS RENT-A-CAR SYSTEM, INC., is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in a state other than the State of California, and authorized to do business and doing business in the State of California.

5

Plaintiff purchases and leases automobiles from other states through defendant, CHRYSLER LEASING CORPORATION, and other automobile manufacturers and lessors from other states. Defendant, CHRYSLER LEASING CORPORATION, leases and sells automobiles throughout all states of the continental United States from manufacturing plants located in several states of the United States. Defendant, AVIS RENT-A-CAR SYSTEM, INC., purchases and leases automobiles from automobile manufacturers and lessors including defendant, CHRYSLER LEASING CORPORATION, in all states of the continental United States and rents said cars to individual persons in all states of the continental United States.

Plaintiff rents cars to various third persons at airports and elsewhere in California. More than one-half of the persons renting cars from plaintiff are in the process of transporting their persons and belongings from and/or to states other than the State of California and the automobiles rented from plaintiff by such third persons are used in continuing the transportation of their persons and property in interstate transportation. Plaintiff advertises in conjunction with a corporation in Illinois known as SLOAN RENT-A-CAR, INC., under the fictitious name of FOSTER-SLOAN RENT-A-CAR. Such advertising is done in the states of Illinois, Minnesota and California and the customers obtained by such advertising are in substantial number. The total business of plaintiff in renting automobiles produces a gross income of $400,000.00 per year and approximately 75 automobiles are almost always in rental. The activities of defendants substantially injured plaintiff's ability to compete for interstate trips of persons of the general public with defendant, AVIS RENT-A-CAR SYSTEM, INC., and its subsidiaries. Defendant, AVIS RENT-A-CAR SYSTEM, INC., is in competition with plaintiff directly and through subsidiaries in the rental of automobiles to third persons in various locations throughout California.

6

From January 1, 1964, continuously until the present time, plaintiff leased from defendant, CHRYSLER LEASING CORPORATION, six hundred and three (603) different Chrysler built automobiles for use in plaintiff's business of car rentals to

various third persons. The number of automobiles leased by plaintiff from defendant, CHRYSLER LEASING CORPORATION, from January 1, 1964, to January 1, 1965, averaged thirty seven (37) which were retained an average of then (10) months each. The number of automobiles leased by plaintiff from defendant, CHRYSLER LEASING CORPORATION, from January 1, 1965, to the present time has averaged seventy five (75) at any one time which were retained an average of seven (7) months each. All automobiles except a very few which were destroyed by accident were kept a minimum of six (6) months.

7

During said period of time CHRYSLER LEASING CORPORATION had leases with defendant, AVIS RENT-A-CAR SYSTEM, INC., and its subsidiaries, which leases were on essentially the same terms as plaintiff's leases except the number of cars varied from lease to lease. AVIS RENT-A-CAR SYSTEM, INC., and its subsidiaries, used said automobiles in their car rental businesses. During said period of time CHRYSLER LEASING CORPORATION entered into an agreement with defendant, AVIS RENT-A-CAR SYSTEM, INC., wherein CHRYSLER LEASING CORPORATION agreed to and did pay or grant to AVIS RENT-A-CAR SYSTEM, INC., and its subsidiaries, a sum of money as an allowance or discount in lieu thereof, which allowance or discount was not for services rendered in connection with the sale or purchase of goods, wares or merchandise and which sum plaintiff believes to have been $125.00 per vehicle per six-month period or $20.83 per vehicle per month.

8

There at all times was, and still is, no difference in the vehicles leased and the operation of plaintiff's business as compared to the vehicles leased and the businesses of defendant, AVIS RENT-A-CAR SYSTEM, INC., and its subsidiaries throughout said period of time. There is no discernable difference between the type of person normally renting automobiles from plaintiff as compared to the type of person normally renting automobiles from defendant, AVIS RENT-A-CAR SYSTEM, INC., and its subsidiaries.

9

Defendant, CHRYSLER LEASING CORPORATION, did not offer said allowance or discount in lieu thereof to plaintiff.

10

By reason of defendant, CHRYSLER LEASING CORPORATION'S failure to offer and pay or credit plaintiff with said allowance or discount in lieu thereof, plaintiff did not receive or overpaid CHRYSLER LEASING CORPORATION either $84,236.52 or $75,375.00. Because of this over-payment plaintiff is entitled to recover threefold the damages sustained, costs of suit and reasonable attorneys' fees.

11

In addition, by reason of said overcharging, plaintiff was not able to effectively compete with defendant, AVIS RENT-A-CAR SYSTEM, INC., and its subsidiaries, because

of plaintiff's inability to compete in the rates charged to third persons for rental of Chrysler built automobiles. The allowance or discount in lieu thereof was from twenty-five to forty percent of the total rental charge for said Chrysler built automobiles under the lease between defendant, AVIS RENT-A-CAR SYSTEM, INC., and CHRYSLER LEASING CORPORATION. By reason thereof, plaintiff's business was damaged in the sum of $10,000,000 for reasonably expected profits and expansion. Plaintiff is entitled to recover threefold the damages sustained, costs of suit and reasonable attorneys' fees.

APPENDIX E

FIRST AMENDED COMPLAINT FOR ANTI-TRUST VIOLATION SECOND CAUSE OF ACTION

1

Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the first cause of action hereinabove set forth.

2

The second cause of action is based upon the provisions of United States Code Title 15, Section 1, and related sections.

3

Defendants, and each of them, contracted, combined and conspired among themselves to restrain the business of automobile rentals by favoring defendant, AVIS RENT A CAR SYSTEM, INC., and its

subsidiaries with a net rental charge of 25 to 40 percent lower than rental charges for like motor vehicles leased to plaintiff by defendant, CHRYSLER LEASING CORPORATION, which all of said defendants knew and intended would injure and restrain plaintiff and other car rental agencies in the similar position of plaintiff from competing effectively in the car rental market of the United States.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

FILED
MAR 1 1974
JR., CLERK

October Term, 1973
No. 73-1167

KEN FOSTER COMPANY, INC., a corporation,

Petitioner,

vs.

CHRYSLER LEASING CORPORATION, AVIS RENT-A-CAR SYSTEM, INC.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

G. WILLIAM SHEA,
FRANKLIN H. WILSON,
JOHN M. ROCHEFORT,
3435 Wilshire Boulevard,
Los Angeles, Calif. 90010,

KEITH A. JENKINS,
P.O. Box 1919,
Detroit, Michigan 48231,
Attorneys for Respondent Chrysler Leasing Corporation.

MAXWELL M. BLECHER,
612 South Flower Street,
Los Angeles, Calif. 90017,
Attorney for Respondent Avis Rent-A-Car System, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Introduction	1
Argument	3
Conclusion	5

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit .....App. p. 1

Appendix B. Amended Order Dismissing First, Fourth and Fifth Causes of Action and Granting Defendants' Motion for Summary Judgment on the Second and Third Causes of Action of First Amended Complaint and Certification for Appeal Pursuant to 28 U.S.C. § 1292(b) 2

TABLE OF AUTHORITIES CITED

Cases	Page
County Theatre Co. v. Paramount Film Distributing Corp., 146 F.Supp. 933 (E.D.Pa. 1956)	4
Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, 219 F.Supp. 400 (W.D.Pa. 1963)	4
Students Book Co. v. Washington Law Book Co. 232 F.2d 49 (D.C. Cir. 1955) cert. denied, 350 U.S. 988 (1956)	4
United States v. United Shoe Machinery Co., 264 Fed. 138 (E.D.Mo. 1920), aff'd, 258 U.S. 451 (1922)	3
Rules	
Federal Rules of Civil Procedure, Rule 12(b)	4
Supreme Court Rules, Rule 19	3, 5
Statutes	
Clayton Act, Sec. 2	3, 4
Clayton Act, Sec. 2(c)	1
Clayton Act, Sec. 3	3, 4
Sherman Act, Sec. 1	2
United States Code, Title 15, Sec. 1	2
United States Code, Title 15, Sec. 13(c)	1, 3
United States Code, Title 28, Sec. 1292(b)	2

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1167

KEN FOSTER COMPANY, INC., a corporation,

Petitioner,

vs.

CHRYSLER LEASING CORPORATION, AVIS RENT-A-CAR SYSTEM, INC.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Introduction.

Respondents Chrysler Leasing Corporation (Chrysler) and Avis Rent-A-Car System, Inc. (Avis) submit this brief in opposition to the petition of Ken Foster Company, Inc. (Foster) for a writ of certiorari.

Foster leased cars from Chrysler for use in its car rental business. On December 30, 1969, Foster commenced this lawsuit. Foster claims it was in competition with Avis and that Chrysler granted brokerage commissions to Avis not granted to Foster and that Chrysler conspired with Avis in restraint of trade.

Foster's first amended complaint sets forth five causes of action. The first cause of action alleges a violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(c). The fifth cause of action alleges the same claim under a similar California statute. Respondents' motion to dismiss the

first and fifth causes of action on the grounds that they failed to state a claim for relief because the Robinson-Patman Act applies only to sales, not leases, was granted on June 5, 1970.[1] (At that time Foster stipulated to the dismissal of the fourth cause of action.)

Issue was joined on the second cause of action, which alleges a conspiracy in restraint of trade between Chrysler and Avis in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the third cause of action, which alleges the same violation under a similar California statute. Extended discovery followed, including three days of deposition of petitioner's president. Following the conclusion of the deposition, respondents moved for summary judgment on the ground the deposition showed there were no triable issues of fact. Petitioner opposed the motion and made several theoretical offers of proof. However, petitioner filed no affidavits and presented no factual opposition to the motion for summary judgment. It was granted on July 20, 1971.[2]

---

[1]Petitioner did not, either at the hearing on the motion to dismiss or in the subsequent discovery and summary judgment proceedings, present any facts indicating that the leases were anything other than bona fide leases. As the Ninth Circuit observed in its affirmance of the District Court:

> "The lease device employed in this case does not resemble a sale so closely as to require a trial to test the reality of the transaction as a lease." [Petition, p. 2a.]

[2]Petitioner states that it is appealing from the judgments dated June 5, 1970, and July 20, 1971. An appeal from these judgments was taken to the Ninth Circuit but the appeal was dismissed on September 5, 1973, because a counterclaim by Chrysler was pending in the District Court (and is still pending). The Ninth Circuit's order of dismissal suggested that the parties obtain from the District Court the statement contemplated by 28 U.S.C. § 1292(b). A new order including such statement was entered on September 17, 1973. The record was immediately returned to the Court of Appeals, and the Ninth Circuit affirmed the September 17, 1973, judgment on November 6, 1973. The September 5, 1973, order of dismissal by the Ninth Circuit ap-

ARGUMENT.

The principal question presented for review by the petition concerns the interpretation and application of the Robinson-Patman Act (hereinafter sometimes referred to as the "Act"). The petition also contains two secondary questions which concern the interpretation and application of the Sherman Act. None of the three questions presents issues of such special importance (as measured by the guidelines set down by Rule 19 of the Supreme Court Rules) to warrant the Court to exercise its discretionary authority to issue a writ of certiorari to review the decisions and orders of the lower courts.

Foster's major proposition is that the so-called "brokers" provision of the Robinson-Patman Act, 15 U.S.C. § 13(c), should be extended to include lessor/lessee transactions notwithstanding a long, clear and unchallenged line of case authority to the contrary which authority is based on the legislative history of the Act.

Congress intentionally limited the scope of the Robinson-Patman Act to sale transactions. The Act was passed in 1936 as a replacement of the original Section 2 of the Clayton Act. While the language of Section 2 of the Clayton Act applied only to sale transactions, Section 3 of the Clayton Act (covering tying arrangements) dealt with both sales and leases. In addition, as early as 1920 the courts had established that Section 2 of the Clayton Act was limited to sale transactions. *United States v. United Shoe Machinery Co.*, 264 Fed. 138 (E.D.Mo. 1920), aff'd, 258 U.S. 451 (1922). At a time when Congress was faced with the

---

pears at Appendix A to this Brief and the September 17, 1973, judgment of the District Court appears at Appendix B to this Brief.

dichotomy in scope between Sections 2 and 3 of the Clayton Act, Congress chose to retain the purchase/sale terminology in the newly enacted Robinson-Patman Act.

The foregoing rule has been judicially carried forward to the present to deny recovery under the Act for a number of arrangements which might otherwise constitute unlawful discrimination in pricing but for the "non-sale" characteristics of the challenged transaction. *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1955) cert. denied, 350 U.S. 988 (1956) [consignment]; *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center*, 219 F.Supp. 400 (W.D.Pa. 1963) [lease] and *County Theatre Co. v. Paramount Film Distributing Corp.*, 146 F.Supp. 933 (E.D.Pa. 1956) [license].

Therefore, contrary to Foster's self-serving recitation that the "major" question which it submits is both novel and of paramount significance to the antitrust laws [Petition, p. 1], the true purpose of the petition is to have the Court reverse a long line of well-settled case authority. However, such a reversal by way of departure from the clear language of the Act as properly interpreted by the courts should come, if at all, from Congress and not the Court.

Foster's standing to raise its two secondary questions concerning the application of the Sherman Act is even more suspect than the portion of the petition devoted to the Robinson-Patman Act. The Robinson-Patman Act allegations were disposed of by way of a Federal Rule of Civil Procedure 12(b) order of dismissal. The Sherman Act allegations were subsequently dispensed with in the district court by an order for summary judgment.

Chrysler and Avis noticed and took the deposition on oral examination of Foster's president. Based upon the total inability of the deponent to provide factual support for Foster's claims under the Sherman Act, Chrysler and Avis moved for summary judgment. Relying entirely upon the allegations contained in its pleadings, *Foster submitted no independent competent evidence in opposition to the summary judgment motion.*

Foster's failure to present any factual showing in opposition to the motion for summary judgment on the Sherman Act and related claims precludes Foster from urging upon this Court facts which it "believed it could show," in the district court [Petition, p. 11].

Conclusion.

Based upon Foster's inability to show that its case falls within the guidelines established by Rule 19 of the Supreme Court Rules or that the case is otherwise of special significance the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

G. WILLIAM SHEA,
FRANKLIN H. WILSON,
JOHN M. ROCHEFORT,
and
KEITH A. JENKINS,
Attorneys for Respondent Chrysler Leasing Corporation.

MAXWELL M. BLECHER,
Attorney for Respondent Avis Rent-A-Car System, Inc.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Ken Foster Company, Inc., *Appellant,* vs. Chrysler Leasing Corporation, Avis Rent-A-Car System, Inc. and Doe 1 through Doe 2,000 inclusive, *Appellees.* No. 71-2408.

[September 5, 1973].

Appeal from the United States District Court for the Northern District of California.

Before: TUTTLE, TRASK and GOODWIN, Circuit Judges.

ORDER

It appearing that the district court neither disposed of the defendant's counterclaim nor certified the dismissals of counts one and five and the summary judgments on counts two and three, the district court's order is not a final judgment from which an appeal may be taken. Fed. R. Civ. P. 54(b). *See Illinois Tool Works, Inc. v. Brunsing,* 378 F.2d 234 (9th Cir. 1967).

On remand the appellants may request that the district court dispose of the counterclaim or make the statement contempated by 28 U.S.C. § 1292 (b) and, if the appeal is perfected, the cause will be submitted to the panel which heard the oral argument. The appeal, if any, will be decided upon the present record and briefs without further oral argument.

The appeal is dismissed.

APPENDIX B.

Amended Order Dismissing First, Fourth and Fifth Causes of Action and Granting Defendants' Motion for Summary Judgment on the Second and Third Causes of Action of First Amended Complaint and Certification for Appeal Pursuant to 28 U.S.C. § 1292(b).

United States District Court, Northern District of California.

Ken Foster Company, Inc., a corporation, Plaintiff, v. Chrysler Leasing Corporation, a corporation, Avis Rent-A-Car System, Inc., a corporation, Defendants.

Chrysler Leasing Corporation, a corporation, Counter-Claimant, v. Ken Foster Company, Inc., a corporation, and Kenneth G. Foster Jr., an individual, Counter-Defendants. No. 69-664-RHS.

Defendants CHRYSLER LEASING CORPORATION and AVIS RENT-A-CAR SYSTEM, INC. moved, pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the first, fourth and fifth causes of action of the first amended complaint upon the ground that each does not state a claim upon which relief can be granted. The court finds that the first, fourth and fifth causes of action of the first amended complaint, and each of them, do not state a claim upon which relief can be granted; and

Defendants also moved, pursuant to Fed.R.Civ.P. 56 (b), for an order of summary judgment on the second and third causes of the first amended complaint upon the ground that there is no genuine issue as to any material fact as to the second and third causes of the first amended complaint and that defendants are entitled to judgment as a matter of law on said causes.

After a full consideration of the pleadings, depositions and all other papers on file and oral agrument, the court finds that there exists no genuine issue as to any material fact as to the second and third causes of the first amended complaint and defendants are entitled to judgment on said causes as a matter of law.

NOW, THEREFORE:

IT IS ORDERED that the first, fourth and fifth causes of action in the first amended complaint are dismissed with prejudice and without leave to amend.

The plaintiff has stipulated to the dismissal of the fourth cause of action. The first cause of action does not state a claim on which relief can be granted because it is based upon the Robinson-Patman Act, 15 U.S.C. § 13, and the Robinson-Patman Act does not apply to leases.

The fifth cause of action does not state a claim upon which relief can be granted because it is based upon a provision of the California Unfair Practices Act, California Business & Professions Code § 17045, and that act and that section do not apply to vertical, as opposed to horizontal, injuries. In addition, that section does not apply to leases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion of defendants Chrysler Leasing Corporation and Avis Rent-A-Car System, Inc. for summary judgment on the second and third causes of the first amended complaint are [sic] granted.

THE COURT IS OF THE FURTHER OPINION that its order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order

may materially advance the ultimate termination of the litigation.

IT IS FURTHER ORDERED that proceedings in this court shall be stayed until the appeal from this order has been finally concluded.

Dated: September 17, 1973.

ROBERT H. SCHNACKE
United States District Judge